

February 2, 2005

**60-DAY NOTICE OF INTENT TO SUE
UNDER THE ENDANGERED SPECIES ACT**

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VIA ELECTRONIC MAIL, FAX, AND CERTIFIED MAIL

**In re: Notice of Intent to Sue Concerning Not Warranted Black-tailed Prairie Dog
Petition Finding**

Dear Secretary Norton, Director Williams, and Director Morgenweck:

In accordance with the 60-day notice requirement of Section 11(g) of the Endangered Species Act (ESA), 16 U.S.C. § 1540(g), you are hereby notified that Forest Guardians, Biodiversity Conservation Alliance, Center for Biological Diversity, Center for Native Ecosystems, Ana Davidson, Great Plains Restoration Council, Predator Conservation Alliance, Rocky Mountain Animal Defense, Nicole Rosmarino, George Wuerthner, and other interested parties intend to bring a civil action for violations of the ESA, 16 U.S.C. § 1531 et seq. and its implementing regulations, 50 C.F.R. § 402 et seq. On August 12, 2004, you announced the decision to remove the Black-tailed Prairie Dog from the list of candidate species awaiting ESA protection as threatened. On August 18, 2004, your “Finding for the Resubmitted Petition To List the Black-tailed Prairie Dog as Threatened,” appeared in the Federal Register. 69 Fed. Reg. 51217-51226 (August 18, 2004). At the time of this decision, the Black-tailed Prairie Dog met the standard for listing as threatened; the species was (and remains) “likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range” (16 U.S.C. § 1532(20)). Your “not warranted” determination on the petitions to list the Black-tailed Prairie Dog (*Cynomys ludovicianus*) and decision to remove the Black-tailed Prairie Dog from the Candidate list under the Endangered Species Act is arbitrary and capricious, not in accordance with law, and not based on the best available science, in contravention of Section 4(b) of the ESA (See 16 U.S.C. § 1533(b)).

For over a century the Black-tailed Prairie Dog has and continues to suffer an onslaught of threats, including poisoning, shooting, habitat destruction, and sylvatic plague. We have provided you extensive documentation on continued actual threats to this species. The removal of the Black-tailed Prairie Dog from the candidate list will likely exacerbate existing threats and perhaps create new threats to the persistence of this species. The removal of this species from the candidate list has prompted us to advise you that we intend to see that the Endangered Species Act is enforced. The Black-tailed Prairie Dog merits listing especially in light of the fact that it is a keystone species in the ecosystems it inhabits. It is your duty, under the law, to issue a listing proposal for this species, notwithstanding the considerable political pressure we are certain you are under to deny this species federal protection. In addition to preventing the further imperilment of the Black-tailed Prairie Dog, listing this species will go a long way in enforcing the ecosystem protection purpose of the ESA.

Your “not warranted” and removal from the candidate list determinations fly in the face of the best available science, which indicates massive historic declines of the Black-tailed Prairie Dog and the continuation of threats responsible for such declines. The belief that current threats to the Black-tailed Prairie Dog will not impair the species’ persistence is spurious and not based upon the scientific literature, which documents devastating impacts of sylvatic plague on this species and high-magnitude impacts from poisoning, shooting, habitat destruction, and the cumulative impact of these threats. We have significant concerns regarding the validity of state estimates of Black-tailed Prairie Dog occupied acreage and believe these estimates to be inflated, rather than based on the best available science, particularly in the state of Colorado.

Due to the threats listed above, coupled with inadequate regulatory mechanisms to conserve the species, the Black-tailed Prairie Dog is threatened or endangered in a significant portion of its range as defined in 16 U.S.C. § 1532(6) and 16 U.S.C. § 1532 (20). However, the Secretary of Interior failed to address in the August 18, 2004 “not warranted” finding the fact that the loss of Black-tailed Prairie Dogs in significant portions of their range causes them to merit a “warranted” finding. A species need not be threatened or endangered in all of its range to merit listing as threatened or endangered. Much of the data referenced in the decision document substantiates the claim that Black-tailed Prairie Dogs are indeed endangered and threatened in significant areas of its range. In *Defenders of Wildlife v. Norton* (258 F.3d 1136 (9th Cir. 2001)), the Ninth Circuit Court reversed a district court’s decision in favor of the defendants who claimed that the flat-tailed horned lizard (*Phrynosoma mcallii*) merited designation as threatened due to being threatened with extinction in significant portions of its range in parts of southern California.

We have chronicled continued, multiple threats to this species throughout its range that have led to significant declines on a local and regional scale and have provided this information to FWS as part of the candidate review process in every year from 2000- 2003.¹ Due to few

¹See Forest Guardians et al. 2003a. Correspondence to Pete Gober, FWS, in re: Annual black-tailed prairie dog status review information request. Dated December 1, 2003; Forest Guardians et al. 2003b. Correspondence to Pete Gober, FWS, in re: Annual black-tailed prairie dog status review information request. Dated February 3, 2003; Forest Guardians et al. 2001. Correspondence to Pete Gober, FWS, in re: Annual black-tailed prairie dog status review information request. Dated December 14, 2001; Rocky Mountain Animal Defense. 2000. Correspondence to Pete Gober, FWS, in re: Data on continued declines in black-tailed prairie dogs. Dated November 9, 2000. By reference, we incorporate these four documents in their entirety.

limits on poisoning and shooting prairie dogs, especially on private land, and the continued interest in exterminating prairie dogs on public and private land, prairie dogs continue to be threatened with extirpation in large portions of their range. You concede that the species' range has contracted in Kansas, Nebraska, Oklahoma, South Dakota, and Texas due to habitat destruction primarily via conversion of grassland to cropland (69 Fed. Reg. 51217-51226, August 18, 2004).

Prairie dog colonies once occurred in expansive clusters or complexes across the original species range. These complexes were a key feature of the spatial patterning of prairie dogs and are necessary to support the long-term survival of the Black-tailed Prairie Dog and the full range of species dependent and associated with prairie dogs. Scientists observed vast complexes of several hundred square miles before government-sponsored poisoning campaigns began in the early 1900s.² The loss of large complexes indicates a loss of significant acres of prairie dogs across their range. Some of the losses are localized and patchy. Currently, no major prairie dog complexes exist in: Arizona, Kansas, Nebraska, New Mexico, North Dakota, Oklahoma, or Texas. Even by your own assessment of recent estimates of prairie dog acreage by state, the Black-tailed Prairie Dog population has declined by 98% throughout its historic range.

The Black-tailed Prairie Dog once existed in southeastern Arizona. The species has been extirpated from its range in Arizona. Grasslands in southern Arizona continue to deteriorate from shrub encroachment due to the absence of prairie dogs.

The state of Colorado commissioned a report by an environmental consulting firm, EDAW, which was issued in October 2000.³ EDAW concluded that, based on GAP vegetation layers using short- and mixed-grass prairie mapping units, there exists a total of 11,184,397 acres of potential Black-tailed Prairie Dog habitat in eastern Colorado. In addition, the report stated that the primary threat to habitat in Colorado was considered to be urban development. Areas of rapid urban development contributing to declining BTPD-occupied habitat include the entire Colorado Front Range, from Colorado City/Pueblo to Fort Collins/Wellington and the Greeley/Ault areas. Moreover, the loss of urban colonies should not be discounted. EDAW wrote that urban areas tend to have high prairie dog occupancy rates compared with rural areas and comprise a significant percentage of occupied prairie dog habitat in the state.

Rocky Mountain Animal Defense (RMAD) has tracked the destruction of over one hundred colonies in Colorado urban areas in recent years. The RMAD report indicated that, of 438 colonies listed in its database, at least 100 have been eliminated recently. Almost all of the colonies on the first list RMAD provided to FWS in were destroyed in 2000 or late 1999. RMAD provided this information to USFWS in 2000.⁴ In addition, the destruction of urban prairie dog colonies has continued at a startling rate, with the loss of 104 colonies to urbanization in 2002.

² Merriam, Clinton Hart. 1902. The prairie dog of the Great Plains. Yearbook of the United States Department of Agriculture. Washington DC: U.S. Government Printing Office; Haley, J. Evetts. 1949. Charles Goodnight, Cowman & Plainsman. Norman: University of Oklahoma Press.

³ EDAW. 2000. Black-tailed prairie dog study of eastern Colorado. Prepared for Colorado Department of Natural Resources, October 27, 2000.

⁴ Nicole Rosmarino, Rocky Mountain Animal Defense, pers. comm. to Pete Gober, November 9, 2000.

Moreover, this recent destruction of BTPDs should be considered cumulatively with declines throughout the 1990s. For example, Miller and Reading (2002) point out that the Colorado Division of Wildlife estimated in 1994 that 17,200 hectares of BTPD habitat could be modified or destroyed by urbanization in the Denver area.⁵

There are some colonies within urban areas around the Front Range that are of substantial size. For instance, a colony measuring up to 950 acres was destroyed by a developer in Aurora in December 1999. The colony was destroyed before it was even measured, but all observers agree that it was a colony of substantial size. Another example is an Arvada colony that measured over 400 acres and was destroyed to make room for a sports complex.

The poisoning and bulldozing is not restricted to private lands. Even open space departments along the Front Range continue to poison or vacuum prairie dogs on lands set aside for native wildlife. Examples include Highlands Ranch Metro Districts (vacuumed over 20 acres in July 2000); Lakewood (poisoned several colonies on open space in 2000, one in order to make room for a new golf course on open space); and Boulder County (poisoned at least 25 prairie dogs in 2000). Fort Collins open space was also set to poison prairie dogs on their land, but we have not yet confirmed whether this has taken place. Area parks departments have also engaged in destruction of prairie dogs and their habitat. Examples include Adams County Parks and Recreation (burrows on a small colony were bulldozed in July 2000); Boulder City Parks and Recreation (evidence of poisoning was found in September 2000); and Douglas County Parks and Recreation (15 acres were poisoned in August 1999).

Urban colonies could serve as sources for artificial prairie dog recolonization of rural areas destroyed by plague, they may possess genetic variations which could possibly result in the development of prairie dog immunity to plague, and they undoubtedly hold tremendous value for associated wildlife seeking out a natural refuge in a hostile urban landscape. However due to Colorado Senate Bill 111, now the statute *Concerning a Prohibition Against the Release of Destructive Rodent Pests into a County Without the Prior Approval of the Board Of County Commissioners of the County*, translocating prairie dogs from areas where they are locally abundant to areas where they are threatened or endangered to become extinct is nearly impossible.

The Kansas Black-tailed Prairie Dog Conservation and Management Plan (Plan) includes, as Appendix III, a brief report by J.S. Pontius (2002) that estimates BTPD acreage in Kansas to be 130,521 (\pm 17,023) acres, based on aerial transects flown in four quadrants within Kansas (22 – 33 transects flown per quadrant).⁶ The Plan also briefly describes BTPD complexes (clusters of adjacent colonies that are within a 7-km radius of each other). Of the 40 largest complexes, 28 (70%) cover less than 300 acres each. Kansas has lost most of the prairie dogs in the eastern portion of their range in the state, and prairie dogs may be absent from about 25% of the counties within prairie dog range (69 Fed. Reg. 51217-51226, August 18, 2004). There are no prairie dog complexes greater than 5,000 acres.

⁵ Miller, Brian and Richard P. Reading. 2002. Threats to the Black-Tailed Prairie Dog and a Plan for Conservation. Wild Earth 12(1): 46-55.

⁶Pontius, Jeffrey S. 2002. Estimates of Acreage and Number of Black-tailed Prairie Dog Towns in Western Kansas. Report submitted to Kansas Department of Wildlife and Parks. 5pp.

Montana Fish, Wildlife and Parks continues to estimate 90,000 acres of BTPDs statewide (including 28,000 acres on tribal lands). This estimate is an increase from the 1998 estimate of 66,000 acres, but the increase is not supported by data. Plague has hit Montana Black-tailed Prairie Dog populations hard, and populations have not recovered (69 Fed. Reg. 51217-51226, August 18, 2004). An additional 6,000 acres were found on the Crow Reservation,⁷ but a 2002 plague event may have eliminated most of this additional acreage. The Fort Belknap Reservation lost about 1,200 acres of prairie dogs to plague since 1999. Until new towns are mapped and shown to be occupied, the previous estimate of 66,000 acres is a more accurate statewide estimate (including tribal lands) than 90,000 acres.

The Black-tailed Prairie Dog is absent from a significant portion of its range in Nebraska, where 25% of eastern counties within the range may have lost their prairie dogs (69 Fed. Reg. 51217-51226, August 18, 2004). Nebraska has one prairie dog complex greater than 1,000 acres but no complexes larger than 5,000 acres.

New Mexico Game and Fish does not have a revised BTPD estimate. However, the most recent BTPD management plan assumes 50,000 acres of BTPDs.⁸ The New Mexico heritage program is evaluating aerial photos. So far, they have found no BTPD towns of major significance anywhere in the state. The largest BTPD town they have identified is a mere 300 acres. The Black-tailed Prairie Dog is absent from a significant portion of its range in western New Mexico, having lost the species in about 25% of its counties (69 Fed. Reg. 51217-51226, August 18, 2004).

North Dakota contains no Black-tailed Prairie Dog complexes great than 5,000 acres (69 Fed. Reg. 51217-51226, August 18, 2004). Craig Knowles recently completed a prairie dog mapping project for North Dakota Game and Fish.⁹ His new estimate is 19,000-20,000 acres: 10,348 acres in 379 colonies on private, Forest Service and state land; 1,000 acres in Theodore Roosevelt National Park; and an estimated 6,000 acres in 137 colonies on Standing Rock Reservation and 4 colonies on Ft. Berthoud Reservation. Knowles ground-truthed prairie dog town references from the Prairie Dog Shooters Guide, data from BTPDs mapped during antelope trend counts, previously known colony data, and an aerial survey. He checked 600 previously known colonies and found that 400 were still active. The previous state estimate by Sidle et al. (2001) indicated that active BTPD colonies cover $34,570 \pm 5,338$ acres.¹⁰ Inactive colonies covered an additional $6,870 \pm 2,768$ acres, or 19.9% of the total (active and inactive) colony area. Again, this likely indicates that BTPDs have been eliminated, due to plague or poisoning, from a substantial proportion of even recently occupied habitat in North Dakota. Sidle et al. (2001) state that, "the black-tailed prairie dog largely occurs on Standing Rock Indian

⁷ Montana prairie dog working group. 2000. Conservation plan for black-tailed and white-tailed prairie dogs in Montana, June 5, 2000 (Draft).

⁸ New Mexico Black-Tailed Prairie Dog Working Group. 2001. Conservation and management strategic plan for black-tailed prairie dogs in New Mexico. Dated 15 November 2001.

⁹ Knowles, C.J. 2003. Status of the black-tailed prairie dog in North Dakota. 54 pp.

¹⁰ Sidle, J.G., Johnson, D.H., and Euliss, B.R. 2001. Estimated areal extent of colonies of blacktailed prairie dogs in the northern Great Plains. *Journal of Mammalogy* 82(4): 928-936.

Reservation.... Regions where colonies of black-tailed prairie dogs occur are largely grassland with a significant element of public ... and tribal ownership” (932-933).

The relatively large discrepancy between the Knowles ground-truthed estimate and the Sidle aerial survey estimate shows aerial survey estimates cannot be considered accurate, or the best available science prior to ground-truthing at least a portion of the aerial survey data. Because Knowles ground-truthed the Sidle aerial survey data in addition to other sources, the Knowles estimate is a more accurate representation, although it is clearly a minimum estimate and additional towns may exist.

Black-tailed Prairie Dogs have disappeared from the eastern portion of their range in Oklahoma. Oklahoma has no complexes greater than 1,000 acres (69 Fed. Reg. 51217-51226, August 18, 2004). Lomolino and Smith (2001) indicate that the majority of current prairie dog acreage is now in the panhandle region of the state (Cimarron, Texas, and Beaver Counties).¹¹ However, over the past decade, prairie dog acreage in these three counties has experienced the largest absolute declines. Lomolino and Smith (2001) further estimate that, in 1998 (the time of their survey), prairie dog acreage represented approximately 1% of the BTPDs historic range in Oklahoma. In the body of the state, these authors estimate that the BTPD currently covers 0.003% of available land surface; in the three panhandle counties, the estimates are 0.156%, 0.165%, and 0.159% for Beaver, Texas, and Cimarron Counties, respectively. In contrast, historically, BTPDs are estimated to have covered 3.9% of the available land surface within the historic range of the species statewide. In addition to the decline in total BTPD acreage in Oklahoma, the mean size of prairie dog towns has decreased substantially from 1989 to 1998.¹² These authors suggest that the declines in the past decade in BTPD acreage cannot be attributed solely to plague outbreaks. Sidle et al. (2001) estimated that active BTPD colonies in South Dakota covered approximately $142,332 \pm 20,114$ acres. Inactive colonies covered an additional $37,782 \pm 12,158$ acres, or 21% of total (active and inactive) colony area. Sidle et al. (2001: 933) further indicate that “(m)ost colonies occur on and in the vicinity of public and tribal lands. From the airplane, the boundary of areas rich in colonies of black-tailed prairie dogs and poor in colonies often was signaled by passage into and out of tribal lands and public lands.... Surprisingly, large areas of South Dakota dominated by privately owned rangeland ... harbor very few colonies of black-tailed prairie dogs.”¹³

Texas has no prairie dog complexes greater than 1,000 acres (69 Fed. Reg. 51217-51226, August 18, 2004). Wyoming has but one prairie dog complex greater than 5,000 acres. At least 16,000 of the 21,000 acres of BTPDs on the Thunder Basin National Grassland in Wyoming have been lost to plague since the Service’s 2000 determination that the Black-tailed Prairie Dog warranted listing but was precluded by higher priorities (65 Fed. Reg. 5476-5488, February 4, 2000).

¹¹ Lomolino, M.V., and G.A. Smith. 2001. Dynamic biogeography of prairie dog (*Cynomys ludovicianus*) towns near the edge of their range. *Journal of Mammalogy* 82 (4):937-945.

¹² Ibid.

¹³ Sidle, J.G., et al. 2001. See p. 933.

The Service has cited management progress among the states and tribes within the 11-state historic range of the Black-tailed Prairie Dog as partial justification for determining that the species does not warrant Endangered Species Act listing. However, several courts have held that future conservation efforts by federal and state agencies do not justify further delay in listing candidate species. First, district courts struck down FWS's reliance on possible future actions of the U.S. Forest Service as a basis for not warranted determinations for both the Alexander Archipelago wolf (*Canis lupus ligoni*) (*Biodiversity Legal Foundation v. Babbitt*, 943 F.Supp. 23 (D.D.C.1996) and the Queen Charlotte goshawk (*Accipiter gentilis laingi*) (*Southwest Center for Biological Diversity v. Babbitt*, 939 F.Supp. 49 (D.D.C.1996)). The U.S. District Court in Texas also rejected an FWS determination that listing was not warranted for the Barton Springs Salamander (*Eurycea sosorum*) because of a conservation agreement between FWS and Texas state agencies (*Save Our Springs Legal Defense Fund, Inc. v. Babbitt*, Civ No. 96-168-CA (W.D.Tex., Mar 25, 1997)). The court held that the efficacy of the conservation agreement was speculative (*Id.* at 9).

In addition, the U.S. District Court in Oregon went one step further in 1998 by holding that the National Marine Fisheries Service could rely neither on future or voluntary conservation measures within the Oregon Coastal Salmon Restoration Initiative Plan to deny listing of the Oregon Coast evolutionarily significant unit of Coho salmon (*Oncorhynchus kisutch*) (*Oregon Natural Resources Council et al. v. Daley et al.*, 6 F.Supp.2d 1139 (D.Or.1998)). Because they are unenforceable, the court maintained that voluntary conservation measures, like future measures, "should be given no weight in the listing decision" (*Id.* at 1155).

Similarly, the Oregon district court rejected FWS's reliance on the Northwest Forest Plan as a justification for finding that the bull trout (*Salvelinus confluentus*) faced only a "moderate" threat and was therefore warranted but precluded (*Friends of Wild Swan, Inc. v. U.S. Fish and Wildlife*, 945 F.Supp. 1388 (D.Or.1996)). The court stated that FWS, "cannot rely upon its own speculations as to the future effects of another agency's management plans to put off listing a species" (*Id.* at 1398). That is precisely the mistake FWS is making in regard to the Black-tailed Prairie Dog.

In an effort to continue using candidate conservation measures as a justification for further delay of listing candidate species, FWS announced a policy to evaluate conservation measures when making listing decisions (68 Fed. Reg. 15100-15115 (March 28, 2003)). This policy forebodes more delay of listing species and perpetuates the Service's reliance on voluntary measures to protect species in decline, rather than employing the array of statutory conservation tools the ESA provides to prevent extinction and achieve recovery.

Moreover, the new FWS policy for evaluating conservation measures when making listing decisions entails consideration of two factors: 1) the certainty that the conservation measures will be implemented; and 2) the certainty that these measures will be effective (68 Fed. Reg. 15100, 15101). In the case of the Black-tailed Prairie Dog, your not warranted and removal from the candidate list determinations violate both prongs of this policy, i.e., conservation measures for this species have little certainty of being implemented or being effective if implemented. Given continued declines and significant threats throughout the Black-tailed

Prairie Dog's range¹⁴ there can be no doubt that conservation efforts being undertaken short of listing are not effectively conserving this species.

As provided under the ESA citizen suit provision, 16 U.S.C. § 1540(g), Forest Guardians, Biodiversity Conservation Alliance, Center for Biological Diversity, Center for Native Ecosystems, Ana Davidson, Great Plains Restoration Council, Predator Conservation Alliance, Rocky Mountain Animal Defense, Nicole Rosmarino, George Wuerthner, and other interested parties may institute legal action after 60 days following the date of this notice for any or all of the foregoing violations of law, and seek declaratory and injunctive relief as appropriate, as well as recovery of their costs and expert and attorney fees.

The U.S. Supreme Court and other courts have frequently noted that the purpose of 60-day notice requirements, such as that contained in the ESA, is to encourage discussions among the parties, in order to avoid potential litigation. That is precisely our intent here in providing this notice. We prefer to avoid litigation if possible. However, if you do not take action to correct these violations within 60 days, we will initiate a citizen suit against you. We urge the reinstatement of the Black-tailed Prairie Dog to the Endangered Species Act candidate list and the prompt issuance of a proposed rule to list this species as Endangered or Threatened under the ESA.

Please contact me at 303-573-4898 to discuss this matter further, or if you believe any of the above statements to be in error or any critical information is missing.

Sincerely,

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¹⁴See fn. 1.

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